

**BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

In the Matter of the General Investigation)
Regarding Whether Electric Utilities Should)
be Considered an “Operator” of Private) Docket No. 17-GIME-565-GIV
Underground Lines Under the Provisions of)
The Kansas Underground Utility Damage)
Prevention Act.)

**JOINT REPLY COMMENTS OF MIDWEST ENERGY, INC., PIONEER ELECTRIC
COOPERATIVE, INC., AND SOUTHERN PIONEER ELECTRIC COMPANY**

COME NOW Midwest Energy, Inc. (“Midwest”), Pioneer Electric Cooperative, Inc. (“Pioneer”), and Southern Pioneer Electric Company (“Southern Pioneer”) (collectively, “Joint Respondents”) and, pursuant to the State Corporation Commission of the State of Kansas (“Commission”) Order Opening General Investigation (“Order”) and Order Setting Procedural Schedule (“Procedural Schedule”), hereby submit their Joint Reply Comments in the above-captioned matter.

I. Electric Utilities Should Not Be Deemed an “Operator” Responsible for Locating Privately-Owned Underground Facilities under the Kansas Underground Utilities Damage Prevention Act (“KUUDPA”).

1. Joint Respondents support the Initial Comments of Kansas City Power & Light Company (“KCPL”), Westar Energy, Inc. (“Westar”), The Empire District Electric Company (“Empire”) and the Kansas Electric Cooperatives, Inc. (“KEC”) (collectively, the “Electric Utilities”) regarding the interpretation of “operator” under KUUDPA, K.S.A. 66-1801, *et. seq.* As stated by Joint Respondents and the Electric Utilities in their respective Initial Comments, electric utilities own, operate, and control underground electric facilities to the point of demarcation of service (“Delivery Point” or “Service Point”), as defined by a utility’s tariffs,

rules and regulations, and/or contract with the customer.¹ The Delivery Point is the point where the customer's facilities interconnect with the utility's system. The electric utility does not own, operate, control, have intimate knowledge of, or otherwise have a legal possessory interest in the customer-owned facilities downstream of the Delivery Point.² The term "operator" should be given its plain meaning pursuant to the statute; that is, the person or entity who owns or operates the underground facilities is the operator. Therefore, the electric utility should not be deemed an "operator" under 66-1802(j) for customer-owned underground facilities for which it does not own or have operational control.³ The electric utility should only be determined to be the "operator" of those underground electric facilities for which it owns and operationally controls that are upstream of the Service Point as defined under each utility's applicable tariffs, rules and regulations and/or contract with the customer.⁴

2. Joint Respondents' respective tariffs, rules and regulations, and/or contract make it clear that (i) the utility assumes no responsibility for damages incurred beyond or downstream of the Service Point where ownership of the facilities change, unless such damages are due to the negligence of the utility; and (ii) the location, installation, and maintenance of all electric facilities downstream of the meter/service point is the sole responsibility of the customer who has full ownership and control of these facilities, including the ability to disconnect service to the customer's location by installing a disconnect switch at the point of demarcation.⁵

3. It would be unreasonable and inappropriate to interpret the "operator" under K.S.A. 66-1802(j) as broadly covering any facilities over which a utility's energy flows, even if

¹ See Initial Comments of KCPL, ¶¶18, 23 and 41; Westar Comments in Response to Commission Questions, ¶¶5-7; Initial Comments of KEC, ¶14, Initial Comments of Midwest Energy, ¶¶5 and 12; Initial Comments of Pioneer and Southern Pioneer, ¶¶6 and 11.

² Id.

³ Id.

⁴ Id.

⁵ See Initial Comments of Midwest Energy, ¶12; Initial Comments of Pioneer and Southern Pioneer, ¶6.

the utility does not have a legal possessory interest in the facilities. Service and title to the energy transmitted by the utility over its facilities clearly ends at the Service Point. Expanding the definition of “operator” to impose legal responsibility and liability on non-operators of facilities would be analogous to requiring a third party that contracts for transmission service to transmit energy over Joint Respondents' facilities be responsible for Joint Respondents' facilities, even though the third party has no ownership or control over such facilities. Interpreting KUUDPA to hold the electric utility legally responsible for assets over which it does not possess a legal right to control is inappropriate, legally incorrect, unduly burdensome, and not in the public interest.

4. The legislative intent of KUUDPA is to protect the public in general from damage and injury caused by underground excavation. It requires “operators” to mark their underground facilities so that excavators can safely dig in the affected area. Expanding the definition of “operator” of private underground facilities to include electric utilities that do not own or have operational control of such facilities does not promote the safety and protection of the public. In the case of Joint Respondents, rural residential customers install and own multiple controlled runs of underground wire extending to more than one building on the customer’s premises (house, barns, sheds, water wells, etc.), and large commercial and industrial customer have complex networks of underground distribution systems downstream of the point of demarcation. Joint Respondents do not have maps or diagrams indicating the location of the customer-owned underground facilities and, as such, these customer-owned underground facilities would be extremely difficult, if not impossible, to accurately locate. In fact, if the utility attempts to locate customer-owned facilities, it could actually result in more damage than if the customer locates the facilities as the customer is in possession of any maps or diagrams that may exist and has

knowledge of the actual location of the facilities. Such a change in the obligation to provide locates for privately-owned facilities certainly does not reduce risk, but rather, transfers increased liability to the entity with no legal interest in the facilities. This is inconsistent with the public safety objective under KUUDPA. The public safety is better served by not putting the utility in the middle; rather, the responsibility to locate privately-owned underground facilities should be between the excavator and the customer as the owner of the private underground facilities, as they are in the best position to ensure accurate locates.⁶

5. The Joint Respondents' and the Electric Utilities' position is consistent with the Kansas One Call notification center process and supporting literature. Utilities provide locates only for utility-owned and operated facilities, and the supporting Excavator's Manual providing safe digging tips to excavators clearly states, *inter alia*, that the owner of the underground facilities is the party responsible for marking the facilities and that the utility will not mark privately-owned underground facilities.⁷ Therefore, the Kansas One Call system does not have information on locates for privately-owned facilities downstream of the utility Service Point.

6. The potential legal risk and cost to the Joint Respondents if required to provide locates to privately-owned underground facilities would be substantial. Joint Respondents would be required to locate and maintain maps and diagrams of all customer-owned underground facilities downstream of every Service Point. This would require working with every customer to attempt to obtain these maps and diagrams, and develop and maintain a database for these maps and diagrams as well as a process to ensure all changes and new locates are documented. This responsibility would take years to complete, and the addition of substantial human resources

⁶ Customers can contract with locate companies or licensed electricians to assist in locates for customer-owned facilities. These companies are better experienced in the National Electric Code ("NEC") and applicable ordinances governing facilities located downstream of the utility Service Point as Electric Utility facilities are governed not by the NEC, but by the National Electric Safety Code.

⁷ See Initial Comments of Midwest Energy, ¶¶6-8; Initial Comments of KCPL, ¶¶28-29.

given the amount of customer-owned facilities that traverse Joint Respondents' service territories due to the primarily rural and commercial nature of their respective customer bases. It is unlikely that Joint Respondents would ever be able to attain and maintain, due to the constantly changing nature and ongoing installations, a complete and accurate database of maps of customer-owned facilities. Further, Joint Respondents do not have easements or legal rights to enter upon customer-owned property to locate privately-owned facilities downstream of the Service Point, and no such right has been created under KUUDPA. This puts Joint Respondents in the position of a trespasser, exposing them to potential liability and expense to their ratepayers, in addition to exposing Joint Respondents to civil litigation and significant damages arising from inaccurate locates of customer-owned facilities.

II. The Non-Utility Participants in This Docket Impermissibly Attempt to Shift Responsibility of the Customer-Owner Underground Facilities from the Owner to the Non-Owner Utility.

7. Initial comments were submitted by K&W Underground, Inc. ("K&W"), Heartland Midwest ("Heartland"), and Progressive Environmental & Safety ("Progressive").⁸ Although K&W acknowledges that it lacks the regulatory expertise to interpret a specific statute, both Heartland and Progressive offer an interpretation of "operator" as that term is used in K.S.A. 66-1802(j). Heartland's interpretation makes little sense, stating that an "operator" should have "control of the utility."⁹ Heartland's position is that neither the home owner nor the contractor have "control of the utility," therefore, arguably whoever has control of the utility should be interpreted as the operator. Based on Heartland's interpretation, the Commission could

⁸ The initial comments filed by K&W, Heartland, and Progressive do not comport with the Commission's rules of practice and procedure relating to the filing of pleadings contained in K.A.R. 82-1-219. Joint Respondents reserve the right to challenge the legitimacy of such comments as record evidence should the Commission rely on such comments. The comments filed by these parties fail to meet the procedural requirements of pleadings filed before the Commission, the comments are not verified, and none of these parties appear to be represented by counsel

⁹ See letter to Leo Haynos, KCC Chief Engineer, from Lee Chapman, President/CEO of Heartland, dated October 10, 2017, p. 1.

be the operator because it has control of the utility. Of course, this is an absurd result, but no more absurd than holding a utility responsible as an operator for underground electric facilities it does not own, operate, control, or otherwise have a legal possessory interest in. Progressive states its belief that "operator" should be interpreted as the electric utility that provides and delivers its product through privately-owned electric lines to its customers.¹⁰ Progressive provides no support or analysis for its belief, only that the utility should be the "operator" because "it is in a unique position and is the entity most capable of providing locates for buried electric lines."¹¹

8. Progressive's argument with regard to locate responsibility appears to be consistent with K&W's and Heartland's fundamental belief that the utility should be required to locate all underground electric facilities, regardless of ownership, because somehow the utility is the entity most familiar with all underground lines, including those it does not own, did not install, is not responsible for repairing or maintaining, and has not mapped. Further, these parties argue it is safer for a utility to locate lines it does not own, did not install, is not responsible for repairing or maintaining, and has not mapped, as compared to the owner of the lines who contracted for the installation. As articulated in paragraph 1-6 above, the Joint Respondents maintain it is illogical to hold the electric utility legally responsible for assets over which it does not possess a legal right to control. Such an interpretation is inappropriate, legally incorrect, unduly burdensome, and not in the public interest. Moreover, it is difficult to argue credibly that it is safer for the utility - with no knowledge as to the whereabouts of customer-owned underground facilities, and no duty to know - to be responsible for locating lines it does not own,

¹⁰ See letter to Leo Haynos, KCC Chief Engineer, from Darren C. Pack, Manager, Utility Damage Prevention & Mitigation of Progressive, dated October 13, 2017, p. 1.

¹¹ Id.

did not install, is not responsible for repairing or maintaining, and has not mapped. The Commission should not countenance this attempt to shift responsibility of the customer-owned underground facilities from the owner to the non-owner utility.

WHEREFORE, the Joint Respondents respectfully request that the Commission accept their joint reply to the Commission Staff's questions filed herein.

Respectfully submitted,

/s/ Susan B. Cunningham

Susan B. Cunningham (#14083)
Dentons US LLP
7028 SW 69th Street
Auburn, KS 66402
Telephone: (816) 460-2441
Mobile: (785) 817-1864
Facsimile: (816) 531-7545
Email: susan.cunningham@dentons.com

Attorney for Midwest Energy, Inc.

/s/ Lindsay A. Shepard

Lindsay A. Shepard (#23276)
Executive Vice President – General Counsel
Southern Pioneer Electric Company
P.O. Box 430
Ulysses, KS 67880
Telephone: (620) 424-5206
Facsimile: (620) 356-4306
Email: lshepard@pioneerelectric.coop

*Attorney for Pioneer Electric Cooperative, Inc. and
Southern Pioneer Electric Company*

VERIFICATION
(K.S.A. 53-601)

STATE OF KANSAS)
) ss.
COUNTY OF SHAWNEE)

I, Susan B. Cunningham, being of lawful age, hereby state that I have caused the foregoing Reply Comments of the Joint Respondents to be prepared, that I have read and reviewed the Initial Comments, and that the contents thereof are true and correct to the best of my information, knowledge and belief.

/s/ Susan B. Cunningham

Susan B. Cunningham

Executed on the 14th day of November, 2017

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Initial Comments of Midwest Energy, Inc. was electronically served on this 12th day of October, 2017, to the persons appearing on the Commission's service as last modified on October 17, 2017.

/s/ Susan B. Cunningham

Susan B. Cunningham